

August 28, 1944

Mr. Ralph A. Lyke
Supervisor of Refunds
Division of Motor Vehicles
Phoenix, Arizona

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Dear Sir:

We have at hand claim of Consolidated Vultee Aircraft Corporation dated May 4, 1944, in the amount of \$2074.70, for refund of gasoline taxes paid from Sept. 1, 1943 to March 31, 1944, to which is attached a U. S. Government tax exemption certificate, form 1094, signed by Ames L. Gill, 2nd Lt. Air Corps, Contracting Officer, dated May 1, 1944.

As we understand the situation the gasoline was sold to the Vultee Corporation by Shell Oil Company at a price which included the 5¢ per gallon state tax, which Shell Company had paid or secured to the state. The gasoline was used in vehicles operated by Vultee Corporation upon public highways of the state.

The Vultee Corporation is a contractor engaged in the erection of government structures under a 100% plus a fixed fee contract with the War Department. At least a part of the vehicles in question are owned by the U. S. Government and operated by the Vultee Corporation under lease or other form of permission from the Government.

The imposition of the state gasoline tax under identical or similar conditions as those outlined has been before this department a number of times since the beginning of war construction by the government and up to the present time the state's right to tax has apparently been upheld by the government. Claims have been made by such contractors as Bechtel and Company, Goodyear Company, and a number of others, claiming under contracts entered into with Defense Plants Corporation, the Department of War, and other governmental Agencies. The tax has been upheld and collected from the beginning and for about three years last past no contractor has presented such claims until the present claim of the Vultee Corporation.

We have expressed our views to the Motor Vehicle Division a number of times heretofore in letters and formal opinions. To make these views clear to the Vultee Corporation, we restate them as follows:

- 1) The gasoline tax is an excise imposed on the privilege of using gasoline in the propulsion of Motor vehicles upon the highways of the state. It is not a tax on property. Its purpose is to require the users to reimburse the state, in part at least, for the cost of repairs, replacements, and the like made necessary by such use. Since the beginning of the war the state has been compelled to pay out large sums in such repairs or replacements. The gasoline tax imposed is but a negligible portion of such cost.

2) The user in these cases is a contractor. His only interest in the work done is his profit or fee. It is immaterial whether his contract is with the government or with a private industry, nor does it matter what is the form of contract, whether a lump sum contract, a cost plus percentage or cost plus fixed fee, or a unit price contract. He is charged with the tax in any event.

3) It does not matter who owns the vehicles used, or whether he leases it from the government or from a private owner. The tax is on the use of the highway by gasoline propelled vehicles, measured by a tax per gallon. If the vehicle is not on the highway, or the use is in operations not upon the highways, the gasoline is not taxed or if taxed the user is entitled to a refund. Such conditions are protected by the use of colored gasoline in nontaxable uses.

4) Gasoline purchased by the government or the agencies or departments for governmental purposes is not taxable. No question of refund arises in such cases for the reason that no tax is imposed at all. The use of form 1094 is to evidence such purchase for governmental purposes. The state however cannot recognize sales made under form 1094 when it knows that the gasoline is not used for governmental purposes, but is purchased for use by a contractor engaged in a purely commercial contract with a governmental agency, and who uses the gasoline in vehicles upon the highway. Neither can the state accept form 1094 as a deduction from the tax paid or assumed by the dealer, when the use is known to have been for non-governmental purposes. This rule applies to the claim of Vultee Corporation, as well as to future like transactions.

The Supreme Court of the United States has thus far uniformly upheld the right of the state to impose the excise under the conditions here appearing, and all contracts for governmental construction we have examined appear to impose upon the contract the obligation to pay the excise imposed.

We therefore believe that the tax was properly collected and the claim of the Vultee Corporation must be rejected.

Very truly yours,

JOE CONWAY
ATTORNEY GENERAL

A. R. LYNCH
ASSISTANT ATTORNEY GENERAL

ARL;j